

## Message Text

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APPROVED BY ARA:HARYAN

S/S: MR. ORTIZ

S:JCOVEY

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FM SECSTATE WASHDC

TO AMEMBASSY BRASILIA

C O N F I D E N T I A L STATE 165222

EXDIS

E.O. 11652: GDS

TAGS: PFOR, BR

SUBJECT: LETTER TO THE SECRETARY FROM FOREIGN MINISTER  
SILVEIRA

1. THE FOLLOWING LETTER FROM FOREIGN MINISTER SILVEIRA  
TO THE SECRETARY DATED JULY 9 WAS DELIVERED TO THE DEPART-  
MENT EVENING JULY 9.

2. BEGIN TEXT: MY DEAR HENRY: WITH THE FRANKNESS WHICH  
HAS ALWAYS CHARACTERIZED OUR EXCHANGE OF VIEWS, I AM PRE-  
SENTING TO YOU TODAY A FEW CONSIDERATIONS ON A THEME OF  
GREAT INTEREST BOTH TO BRAZIL AND THE UNITED STATES OF  
AMERICA: THAT OF PROCEEDINGS OF THE INTERNATIONAL LAW  
COMMISSION AS REGARDS THE TASK OF THE PROGRESSIVE CODIFI-  
CATION OF INTERNATIONAL LAW RELATIVE TO THE NON-NAVIGAT-  
IONAL USES OF INTERNATIONAL WATERCOURSES.

3. AS YOU KNOW, THE COMMISSION, DURING ITS 26TH SESSION,  
CREATED, FOR THE SPECIFIC TREATMENT OF THE SUBJECT, A SUB-  
COMMITTEE WHICH DECIDED, AS AN INITIAL MEASURE, TO PREPARE  
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A QUESTIONNAIRE FOR SUBMITTAL TO THE MEMBER STATES OF THE  
UNITED NATIONS FOR THE PURPOSE OF CLARIFYING A NUMBER OF  
PRELIMINARY ASPECTS OF THE THEME.

4. AMONG THE NINE QUERIES IN THE AFOREMENTIONED QUESTIONNAIRE, THE SECOND ONE, WORDED AS FOLLOWS, IS OF SPECIAL IMPORTANCE: "IS THE GEOGRAPHICAL CONCEPT OF AN INTERNATIONAL DRAINAGE BASIN THE APPROPRIATE BASIS FOR THE STUDY OF THE LEGAL ASPECTS OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES?"

5. THE ANSWER TO THIS QUERY PRESUPPOSES, NATURALLY, NOT ONLY A BROAD SCIENTIFIC AND TECHNICAL INSIGHT, BUT ALSO A PERFECT AWARENESS OF THE POLITICAL IMPLICATIONS OF THE SUBJECT. DRAINAGE BASIN IS, IN FACT, A TERRITORIAL CONCEPT WHICH MAY CONSTITUTE IN THE INTERNATIONAL FIELD NOT MORE THAN AN APPROPRIATE UNIT FOR CERTAIN PROJECTS OF DEVELOPMENT AND PHYSICAL INTEGRATION. SUCH A CONCEPT, HOWEVER, DOES NOT IN FACT HAVE ANY BEARING ON THE LEGAL ASPECTS OF THE USES OF WATERCOURSES. THE BRAZILIAN GOVERNMENT CONSIDERS, THEN, THAT THE PRESENT STUDY ENTRUSTED UPON THE ILC SHOULD NOT BE BASED ON THE CONCEPT OF AN INTERNATIONAL DRAINAGE BASIN - BY ALL MEANS INADEQUATE - BUT ON THE TRADITIONAL DEFINITION OF INTERNATIONAL WATERCOURSES, I.E., THOSE WHICH SEPARATE OR EUT ACROSS THE TERRITORY OF TWO OR MORE STATES.

6. THE SAME REASONING APPLIES TO QUESTION C, RELATED TO THE POSSIBILITY OF THE ILC TAKING THE CONCEPT OF DRAINAGE BASIN AS A BASIS FOR ITS STUDY OF THE LEGAL ASPECTS OF THE POLLUTION OF INTERNATIONAL WATERCOURSES. ONCE AGAIN, THE CONCEPT OF DRAINAGE BASIN, INSOFAR AS IT APPLIES TO A TERRITORIAL, STATIC UNIT, DOES NOT SEEM APPROPRIATE FOR THE STUDY OF THE LEGAL ASPECTS OF POLLUTION, SINCE THE CONDUCTING VEHICLE OF POLLUTION IS THE WATERCOURSE ITSELF, A MOVING UNIT OF THE LARGER PHYSICAL COMPONENT.

7. THE POSITION ADOPTED BY THE GOVERNMENTS IN REGARD TO

THE THEMES TO WHICH I HAVE REFERRED AND WHICH WILL  
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INFLUENCE THE WORK OF THE INTERNATIONAL LAW COMMISSION ARE FAR FROM BEING MERELY ACADEMIC BUT RATHER INCIDE DIRECTLY UPON THE POLICY OF NATIONAL DEVELOPMENT ITSELF ADOPTED BY THE STATES WITH A VIEW TO THE COMMON WELL-BEING OF THEIR INHABITANTS. IN EFFECT, BY ACCEPTING THE CONCEPT OF DRAINAGE BASIN WE WOULD BE CONTRIBUTING TOWARDS THE CRYSTALLIZATION OF A PROCESS WHEREFROM THERE WOULD BE INEXORABLY DERIVED A RIGID SYSTEM OF PRIOR CONSULTATION THAT MIGHT BRING THE GRAVEST CONSEQUENCES TO THE INTERNAL LIFE OF OUR COUNTRIES. THE TREATMENT OF THE SUBJECT IS EVIDENTLY MUCH MORE SERIOUS WITHIN THE AMBIT OF THE INTERNATIONAL LAW COMMISSION, WHICH AIMS ON A LAST ANALYSIS AT THE ELABORATION OF JURIDICAL NORMS,

THAN IT WOULD BE WITHIN THAT OF SPECIALIZED INTERNATIONAL ORGANIZATIONS, WHOSE PROCEEDINGS AND DECISIONS DO NOT TRANSCEND THE FIELD OF RESOLUTIONS AND RECOMMENDATIONS.

8. IT IS EVIDENT THAT WE ARE NOT AGAINST CONSULTATION PER SE, AS IT IS A METHOD OF COMMUNICATION WHICH IS TRADITIONAL AND IRREPLACEABLE IN INTERNATIONAL RELATIONS. WE CANNOT, HOWEVER, ACCEPT THE SUSPENSIVE CHARACTER WHICH SOME INTERESTED PARTIES HAVE WISHED TO IMPART TO THE INSTITUTION OF "PRIOR CONSULTATION" RELATING TO THE USE OF NATURAL RESOURCES. AS A MATTER OF FACT, THE DEFENSE OF THE PRINCIPLE OF JURIDICAL RESPONSIBILITY APPEARS TO ME TO BE A SERIOUS OBLIGATION, PRINCIPALLY FOR COUNTRIES SUCH AS OURS THAT, ON DIFFERENT HYDROGRAPHICAL BASINS, OCCUPY BOTH UPPER AND LOWER RIPARIAN POSITIONS.

9. I WAS GREATLY SURPRISED, THEREFORE, AT BEING INFORMED THAT IN ITS RESPONSE TO THE QUESTIONNAIRE OF THE SUBCOMMITTEE OF THE INTERNATIONAL LAW COMMISSION, THE GOVERNMENT OF THE UNITED STATES, EXPRESSLY ACCEPTING THE CRITERION OF THE UNITY OF THE HYDROGRAPHICAL BASINS, CONSIDERS THAT "THE CONCEPT OF AN INTERNATIONAL DRAINAGE BASIN FROM THE STANDPOINT OF PHYSICAL GEOGRAPHY WOULD BE THE APPROPRIATE BASIS FOR STUDY OF THE LEGAL ASPECTS BOTH OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES AND OF THE POLLUTION OF SUCH WATERCOURSES".

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10. IN FACT, THE POSITION OF ABSTENTION ADOPTED BY THE UNITED STATES DELEGATIONS IN THE COURSE OF DISCUSSIONS ON THE SUBJECT OF THE USE OF NATURAL RESOURCES IN GENERAL, AND OF INTERNATIONAL WATERCOURSES IN PARTICULAR, WITHIN THE VARIOUS INTERNATIONAL ORGANIZATIONS DEALING WITH THE MATTER, HAS BEEN THE CAUSE OF NO LESSER PERPLEXITY TO ME.

11. THAT POSITION, IN EFFECT, DOES NOT SEEM TO ME TO BE THE ONE MOST ADEQUATE TO THE PECULIARITIES OF COUNTRIES WITH THE GEOGRAPHIC CHARACTERISTICS POSSESSED BY OURS. IT DIVERGES, ON THE OTHER HAND, FROM THE PRINCIPLES WHICH THE UNITED STATES HAS DEFENDED IN THE TREATMENT OF SPECIFIC QUESTIONS WHICH IT HAS BEEN FACING, PRINCIPALLY ALONG ITS SOUTHERN BORDERS. IT WOULD SUFFICE TO REFER HERE TO THE ADOPTION OF THE WELL-KNOWN HARMON DOCTRINE, IN 1895, AND TO THE EVOLUTION WHICH ITS RIGID PRINCIPLES HAVE UNDERGONE WHENEVER APPLIED TO EACH CASE. IN EFFECT, WHEN THE UNITED STATES OF AMERICA RECOGNIZES, IN A PRAGMATIC SPIRIT, THE SPECIFIC RIGHTS OF OTHER RIPARIAN STATES IN THE MATTER, IT HAS ALWAYS TAKEN CARE TO PUT ON RECORD THAT SUCH RECOGNITION DOES NOT CONSTITUTE A

PRECEDENT AND DOES NOT DERIVE FROM THE APPLICATION OF  
GENERAL RULES.

12. I COULD NOT FAIL, WITHIN THE CONTEXT OF OUR CORDIAL  
PERSONAL RELATIONS, TO ASK YOUR SPECIAL ATTENTION TO  
THIS SUBJECT, WHOSE IMPORTANCE AND GRAVITY FOR OUR TWO  
COUNTRIES DEMAND, IN MY VIEW, A PERMANENT POLITICAL  
ORIENTATION.

13. I ASK, FURTHERMORE, YOUR ATTENTION TO THE BRAZILIAN  
REPLIES TO THE QUESTIONNAIRE OF THE SUBCOMMITTEE OF THE  
INTERNATIONAL LAW COMMISSION, A COPY OF WHICH IS ENCLOSED  
HEREWITH.

14. I LOOK FORWARD WITH THE DEEPEST INTEREST TO A WORD  
FROM YOU CONCERNING THESE MATTERS, AND REMAIN, VERY  
SINCERELY YOURS, ANTONIO. END TEXT.

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15. REPLIES TO THE QUESTIONNAIRE OF THE SUBCOMMITTEE OF  
THE INTERNATIONAL LAW COMMISSION FOLLOWS BY POUCH.  
PORTUGUESE TEXT ALSO FOLLOWS BY POUCH. INGERSOLL

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